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9 JUAN BANALES VENEGAS

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JUAN BANALES VENEGAS,
16 Defendant.

17 **CASE No.: CR 10-600-R**

18 **REPLY TO GOVERNMENT'S**
19 **OPPOSITION TO DEFENDANT'S**
20 **RULE 33 MOTION FOR NEW**
21 **TRIAL**

22 Date: January 10, 2011

23 Time: 1:30 p.m.

24 Courtroom of Judge Manuel Real

25 COMES NOW Defendant, JUAN BANALES VENEGAS, and hereby
26 submits the following Reply to the Government's Opposition.

27 DATED: December 27, 2010

28 _____/s/_____

LUIS A. CARRILLO
Attorney for Defendant
JUAN BANALES VENEGAS

A. The Court’s rulings, in their totality, denied defendant the right to a fair trial and thus denied defendant rights guaranteed by the Fifth Amendment.

As stated in Professor Laurie L. Levenson’s Federal Criminal Rules Handbook (2009), at page 543, “**Affecting Substantial Rights** - An error affects substantial rights if it causes that type of prejudice that makes it likely that the defendant was denied a fair trial – United States v. Sumlin, 489 F.3d 683 (5th Cir. 2007) (admission of improper character evidence affected fairness of trial).

The cumulative effect of the Court’s rulings, all in favor of the government; and all in denial of defendant’s objections, denied defendant a fair trial, and thus denied defendant his right to a fair trial guaranteed by the Fifth Amendment.

B. The government has not mentioned that the Indictment did not contain any reference to “straw buyers, kickbacks” and further, that the Indictment did not contain any reference to the “Erica Place” or the “807A” properties.

As stated in pages 2 and 3 of the Indictment: “The Fraudulent Scheme

6. Beginning on an unknown date, and continuing until at least in or about October 2007, in Ventura County, within the Central District of California, and elsewhere, defendants MIRIAM SUKEY ESTRADA, ADELA NARANJO, MARIA DEL ROCIO PARTIDA, and JUAN MANUEL BANALES VENEGAS, aka “Chicken Little” (“BANALES”), together with, and aided and abetted by, others known and unknown to the Grand Jury, knowingly, and with the intent to defraud, executed and attempted to execute a scheme to defraud Bank of America and WAMU, and other financial institutions, and to obtain monies and funds owned by and in the custody and control of said financial institutions, by means of false and fraudulent pretenses, representations, and promises and the concealment of material facts.

1 7. The fraudulent scheme operated in substance in the following manner:

2 a. Defendants ESTRADA and NARANJO operated Platinum
3 Power for the purpose of assisting borrower-customers in obtaining loans to
4 purchase real property. Defendants received compensation for their services in the
5 form of loan origination fees and/or yield spread premiums.

6 b. Defendant ESTRADA operated Premier Tax Service for the
7 purpose of preparing tax returns and correspondence for customers and in support
8 of loan applications submitted to lenders through Platinum Power.

9 c. Defendant PARTIDA represented buyers and sellers of real
10 property.

11 d. Defendant BANALES purchased real property.

12 e. Defendants misrepresented and omitted, caused to be
13 misrepresented and omitted, and aided and abetted the misrepresentation and
14 omission of, material facts in connection with loan applications submitted to
15 financial institutions, including that borrowers were self-employed owners of
16 businesses, when, in facts, borrowers were not self-employed or the businesses
17 were non-existent; that borrowers earned income that, in fact, they did not earn;
18 that borrowers intended to occupy property sought to be purchased when, in fact,
19 borrowers did not intend to occupy said property;’ and that borrowers owned
20 certain assets, including bank accounts with large balances, when, in facts,
21 borrowers did not have any bank accounts or their accounts did not have large
22 balances.”

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24 The Counts against defendant were counts one, four, and five:

25 “COUNT ONE - Execution of loan application for submission to WAMU
26 for the purchase of 301 W. Cedar Street, Oxnard California, that falsely stated that
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1 borrower, defendant BANALES, was the self-employed owner of “Juan’s
2 Computer Service” and earned \$12,303 per month.

3 COUNT FOUR - Wire transfer of approximately \$475,802 from JP Morgan
4 Chase Bank in New York, New York, to First American Title Federal Savings
5 Bank in Santa Ana, California.

6 COUNT FIVE - Wire transfer of approximately \$471,061 from Deutsche
7 Bank in New York, New York, to First American Title Federal Savings Bank in
8 Santa Ana, California.”

9 Nowhere in the Indictment is there any mention of “straw buyers” or
10 “kickbacks” or the Erica Place property, or the “807A” property which the Court
11 permitted the government witnesses to testify.

12 **C. The allegations concerning the “straw buyers” and “kickbacks” are not**
13 **inextricably intertwined with the fraudulent scheme of the Indictment.**

14 The 807A property, the Erica Place property, and allegations of “straw
15 buyers” and “kickbacks” were not part of the scheme to defraud the banks
16 mentioned in the Indictment and any alleged “actions” of defendant in connection
17 with 807 and Erica were not “actions actually taken to execute the scheme” to
18 defraud Bank of America, WAMU or Deutsche Bank.

19 The case of United States of America v. Sayakhom 186 F.3d 928(9th Cir.
20 1999) explains the meaning of “inextricably intertwined” with a fraudulent scheme
21 to defraud. In Sayakhom, the defendant was charged with mail fraud and money
22 laundering in connection with the defendant selling life insurance without the
23 approval of the State of California.

24 The defendant Sayakhom objected to the introduction of evidence regarding
25 her “Mutual Assistance Planning Servicer Program” (MAPS). The Defendant
26 Sayakhom formed the “Asian Assistance Center” (AAC) to sell life insurance to
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1 low-income residents even though AAC was not licensed to sell life insurance. The
2 evidence of AAC and MAPS was part of a single criminal transaction and scheme
3 to defraud.

4 In Sayakhom the evidence of AAC and MAPS was part of the single
5 criminal transaction; the fraudulent scheme to defraud. But in our case, the
6 fraudulent scheme to defraud and charged in the Indictment was related to a
7 scheme to defraud Bank of America, WAMU, J.P. Morgan, and Deutsche Bank in
8 specific real properties: Cedar, Astoria, and Douglas. Any evidence related to 807,
9 Ash and Erica Place are “other crimes evidence” which was not charged in the
10 Indictment and for which the government gave no notice that it would introduce
11 this evidence.
12

13 The Sayakhom case helps defendant because the evidence against defendant,
14 alleged actions of defendant in the alleged “straw buyers” and “kickbacks” were
15 not part of a single criminal transaction or scheme to defraud, and were not
16 inextricably intertwined with the fraudulent scheme to defraud Bank of America,
17 WAMU, or Deutsche Bank in the purchase of Cedar, Astoria & Douglas.

18 The Sayakhom court held: “The MAPS evidence is not subject to exclusion
19 under Rule 404(b) because it is inextricably intertwined with the indicted crimes.
20 Evidence should not be treated as ‘other crimes’ evidence when ‘the evidence
21 concerning the [other] act and evidence concerning the crime charged are
22 inextricably intertwined.’” United States v. Soliman, 813 F.2d 277, 279 (9th Cir.
23 1987) (citing United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979)); [**15]
24 see also Ripinsky, 109 F.3d at 1442 (uncharged crimes were “direct evidence of
25 the ongoing conspiracy charged in the indictment”); United States v. Vizcarra-
26 Martinez, 66 F.3d 1006, 1012 (9th Cir. 1995) (“when it is clear that particular acts
27 of the defendant are part of, and thus inextricably intertwined with, a single
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1 criminal transaction,” admission of evidence of those acts does not violate Rule
2 404(b)).

3 The government presented testimony that Sayakhom began operating MAPS
4 after the closure of the AAC in order to continue the unlawful sale of life insurance
5 products. The government presented evidence that Sayakhom attempted to recruit
6 former AAC employees to sell products for MAPS. The government introduced
7 testimony that Sayakom attempted to convert AAC clients to the MAPS program.
8 This evidence tends to show that Sayakhom continued her fraudulent scheme
9 through the operation of MAPS...This evidence establishes that AAC and MAPS
10 were part of an ongoing scheme to defraud. MAPS was simply a disguise for
11 Sayakhom’s continued sale of unauthorized insurance products after the
12 government shut down the AAC.
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14 In our case there was nothing in the Indictment “inextricably linking” the
15 “Erica Place” property, or the “807A” property with the charged crimes.

16 Moreover, the case of United States v. King 200 F. 3d 1207 (9th Cir. 1999)
17 provides guidance as to what are separate fraudulent schemes, and must be
18 charged separately:

19 “This court has not yet addressed a duplicity challenge in a bank fraud case.
20 However, in multiplicity challenges under the bank fraud statute, we have held that
21 each “execution” of a fraudulent scheme is punishable as a separate count. See
22 United States v. Poliak, 823 F.2d 371, 372 (9th Cir. 1987). In other words, the bank
23 fraud statute “*allows* charging each execution of the scheme to defraud as a
24 separate act. Id. (emphasis added). The question now before this court is whether
25 an act which *can* be viewed as an independent execution of a scheme *must* be
26 charged in a separate count.
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1 The District of Columbia Circuit addressed this very question in United
2 States v. Bruce, 319 U.S. App. D.C 245, 89 F.3d 886, 889-90 (D.C. Cir. 1996). In
3 that case, the court rejected a duplicity challenge in a bank fraud prosecution,
4 holding that an act which can be viewed as an independent execution of a
5 fraudulent scheme need not be charged in a separate count. *89 F. 3d at 889*. In so
6 holding, the court endorsed the Seventh Circuit's reasoning in United States v.
7 Hammen, 977 F.2d 379 (9th Cir. 119):

8 "Each execution need not give rise to a charge in the indictment. The
9 indictment in this case sets forth the existence of a scheme and alleges
10 the scheme was executed on at least one occasion. The allegations
11 tending to demonstrate the existence of the scheme do appear to be
12 allegations that, if worded and structured differently, might constitute
13 additional executions. This is hardly surprising; the actions that tend
14 to prove the existence of the scheme will often be the actions actually
15 taken to execute the scheme."

16
17 Id. At 383. We find this analysis sensible and persuasive, and we therefore
18 hold that each execution of a scheme to defraud need not give rise to a charge in
19 the indictment."

20 In our case, there was nothing to connect the allegations of fraud to the Erica
21 Place and 807A properties other than the self-serving statements of the government
22 witnesses who are convicted felons.

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D. The government did not charge defendant in the Indictment with any fraudulent scheme to purchase “Erica Place” or “Ash” or “807A” properties.

The government argues at page 6:

“Furthermore, in discovery as well as in connection with government’s motion *in limine* no. 11, defendant was well aware that the “other” alleged criminal acts included the properties called “Erica Place,” “Ash,” and “807A.” See Government’s Motion *In Limine* No. 11, subpart 5.”

Again, there was nothing to connect the allegations of fraud to the Erica Place and 807A properties other than the self-serving statements of the government witnesses who are convicted felons.

E. The government’s motion in limine number 11 did not give notice that government witnesses would testify that Roberto Gonzalez or Manuel Loubet were “straw buyers” for defendant.

The Government’s motion in limine no. 11 did not give notice that Miriam Estrada would testify as to Rodolfo Gonzalez being a “straw buyer” and that defendant was associated with Rodolfo Gonzalez. Evidence of Rodolfo Gonzalez was a “loaded shotgun” that defendant was not prepared to address. Nothing in the Indictment gave notice of a fraudulent scheme of “straw buyer” and “kickbacks” and the government gave no notice of these specific uncharged bad acts of defendant and Roberto Gonzalez.

Moreover, the Rodolfo Gonzalez evidence is not inextricably intertwined to the charged offenses because there is no “linking” of alleged false income, false ownership of business, false bank account assets, or false employment, to Rodolfo Gonzalez.

1 “Kickbacks” and “straw buyers” were never alleged in the “charged
2 scheme” of indictment and the government never gave notice that the government
3 was going to introduce evidence of “straw buyers” and “kickbacks” and the “Erica
4 Place” and “807A” properties.

5 **F. The Court’s denial of an expert to testify of defendant’s “severe**
6 **impairment” in the English language also denied defendant a fair trial.**

7 On page 17 of the government's opposition, the government states that:
8 Defense counsel did not proffer “what expert evidence of defendant's 'severe
9 deficiencies' in English he sought to introduce.”
10

11 This statement is factually incorrect. Both the Government and the Court
12 asked defense counsel about a mental condition of defendant such that defendant
13 was incompetent to stand trial. Defense counsel did inform the government and the
14 Court of the severe deficiencies of defendant in the English language and also
15 provided the government and the Court with a report of Dr. Mares. Dr. Mares in
16 her examination of the defendant found that defendant was “severely impaired” in
17 the English language. Rules 702 and 703 of the Federal Rules of Evidence would
18 have permitted the testimony of Dr. Mares.

19 **G. The Court denied defense counsel full cross-examination of government**
20 **witnesses about e-mails two government agents had written, and denied**
21 **defendant the opportunity to introduce an e-mail written by an agent.**

22 Defense counsel did seek full cross-examination of two government agents
23 about the e-mails that the two government agents wrote. Defense counsel also did
24 seek to introduce one e-mail but was prohibited by the Court. Moreover, the e-mail
25 that defendant sought to introduce did specifically state the government agent had
26 “a hard time understanding” defendant. This particular e-mail could have been
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1 admitted under Rule 803 of the Federal Rules of Evidence under subsection (1) and
2 subsection (5). The e-mails are attached hereto as Exhibit A.

3 **H. The Court's repeated rulings in favor of the Government denied defendant**
4 **a fair trial.**

5 The Court erred by permitting, over defense objection, the introduction of
6 evidence of City of Oxnard Municipal Code Citations given to defendant after the
7 date of the alleged offenses in this case. The Court erred by permitting, over
8 defense objection, photographic evidence that the Cedar home purchased by
9 defendant lacked running water and had illegal electrical and toilet hook ups. (The
10 photographs permitted by the Court are attached hereto as Exhibit B). The Court
11 erred by permitting, over defense objection, the jury to hear an audiotape of a small
12 claims court proceeding of the year 2009, two years after the date of the alleged
13 offenses in this case. Moreover, the Court erred in permitting the government to
14 question the witnesses in a leading manner that assisted the testimony of the
15 government witnesses in the government's favor.
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17 The cumulative effect of the Court's rulings in favor of the Government
18 affected the Constitutional and substantial rights of defendant in that the rulings
19 caused the jury to be prejudiced against defendant, making it likely that defendant
20 was denied a fair trial. Furthermore, these errors by the Court affected the fairness
21 and integrity of the judicial proceedings.
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23 **CONCLUSION**

24 For the reasons stated hereinabove, the conviction of defendant should be set
25 aside and this Honorable Court should grant defendant a new trial.
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2 Respectfully submitted,

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4 Dated: December 27, 2010

LUIS A. CARRILLO

5 _____/s/_____

6 Attorney for Defendant

7 JUAN BANALES VENEGAS
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